

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE AUTOMOTIVE PARTS
ANTITRUST LITIGATION

Master File 12-md-02311

Hon. Marianne O. Battani

IN RE OCCUPANT SAFETY SYSTEMS

THIS TRANSCRIPT RELATES TO:

THIS TRANSCRIPT RELATES TO:
Case No. 15-12050

RUSH TRUCKS

Case No. 15-12050

MOTION TO STAY

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Monday, December 14, 2015

APPEARANCES:

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TABLE OF CONTENTS

	<u>Page</u>
3	
	<u>MOTION TO STAY FIRST AMENDED COMPLAINT</u>
4	
	Motion by Mr. Iwrey..... 5
5	Response by Mr. Parks..... 34
	Reply by Mr. Iwrey..... 49

1 Detroit, Michigan

2 Monday, December 14, 2015

3 at about 1:50 p.m.

4

— — —

5 (Court and Counsel present.)

6 THE LAW CLERK: Please rise.

7 The United States District Court for the Eastern
8 District of Michigan is now in session, the Honorable
9 Marianne O. Battani presiding.

10 You may be seated.

11 THE COURT: Good afternoon.

12 MR. IWREY: Good afternoon.

13 MR. PARKS: Good afternoon, Your Honor.

14 THE COURT: Seems like someone is missing, doesn't
15 it?

16 MR. IWREY: Many people.

17 THE COURT: Many people. Okay. This is
18 Rush Trucks vs. TRW and AutoLiv. Do you want to give me your
19 appearances first for the record.

20 MR. IWREY: Your Honor, Howard Iwrey from Dykema on
21 behalf of ZF TRW defendants.

22 MR. JOHNSON: Cale Johnson, also from Dykema, on
23 behalf of the ZF TRW defendants.

24 MS. KINGSLEY: Meredith Kingsley of Alston & Bird
25 on behalf of the AutoLiv defendants.

1 MS. SWANSON: Joanne Geha Swanson from Kerr,
2 Russell, Weber on behalf of the AutoLiv defendants.

3 MR. PARKS: Your Honor, Manly Parks on behalf of
4 the Rush entities.

5 THE COURT: All right. Let's proceed.

6 MR. IWREY: Thank you.

7 THE COURT: Mr. Iwrey, I did read this all and I
8 received the supplemental authority too --

9 MR. IWREY: Thank you, Your Honor.

10 THE COURT: -- earlier this month.

11 MR. IWREY: Thank you, Your Honor. Your Honor,
12 Howard Iwrey speaking on behalf of ZF TRW and TRW
13 Deutschland. I'm also speaking on behalf of moving party
14 AutoLiv.

15 I have prepared some slides which I'm projecting up
16 there, and if I could approach the Court I have copies for
17 you all?

18 THE COURT: Okay.

19 MR. IWREY: Your Honor, put simply, the punitive
20 class in the Rush complaint is part of the dealer settlement
21 classes for TRW and AutoLiv, which were preliminarily
22 approved months before the Rush complaint was filed and
23 finally approved by the Court on November 18th of this year.
24 These class settlements bar Rush from pursuing its own subset
25 class action. The dealers settlement classes apply to all

1 automobile dealers that purchased new vehicles.

2 THE COURT: Let me ask a question.

3 MR. IWREY: Yes.

4 THE COURT: The dealer settlement classes, when
5 they sent out the notices there were some 16,000 notices I
6 think you said?

7 MR. IWREY: Yes, Your Honor, 16,000 were mailed and
8 over 100,000 were e-mailed.

9 THE COURT: Were one of those to Rush?

10 MR. IWREY: I can't tell you that, that was handled
11 by the settlement administrator for the dealers. I'm
12 assuming one was sent to Rush.

13 THE COURT: Just curious. Okay. Go ahead.

14 MR. IWREY: Since Rush is listed, for example, as a
15 Ford dealer and there were Ford dealers on there. The dealer
16 settlement notice also went to Freightliner dealers but that
17 was not disclosed by the dealers in its affidavit, I'm sure
18 they could answer.

19 THE COURT: Okay.

20 MR. IWREY: Rush's only argument in opposition to
21 our motion here is that the members of the punitive Rush
22 class are somehow not automobile dealers. As I will discuss,
23 Your Honor, that argument frankly is nonsense for a number of
24 reasons. First, it is completely inconsistent with the
25 Court's own definition of the term automobile dealers.

1 Second, Rush relies on a completely fabricated dividing line
2 based on vehicle weight to define what is and isn't an
3 automobile. That magic dividing line has zero support in the
4 record. Furthermore, as we will see, that dividing line
5 would have the absurd result of creating overlapping classes
6 because it would mean that Rush class members are in the
7 dealer settlement and members of the dealer settlements would
8 be in the Rush punitive class, and some dealers would
9 actually be nowhere, not even in this MDL, according to
10 Rush's definition.

11 Third and perhaps most confusingly, given its
12 contrary stance, Rush publicly portrays itself as an
13 automobile dealer. Rush intentionally filed this action
14 within the In re: Automobile Parts Antitrust Litigation. How
15 can it possibly say that its case has nothing to do with
16 automobiles or automobile dealers? Subscribing to Rush's
17 view would threaten to throw a serious monkey wrench in
18 existing settlements and substantially hinder future
19 settlements in these cases and other parts cases.

20 I would like to take a few minutes to provide a bit
21 of background. First, as you know, AutoLiv and TRW reached
22 separate settlement agreements with the dealer class on
23 May 30, 2014 and September 20, 2014. As you can see in the
24 slide, in paragraph 10 of both settlement agreements the
25 settlement class was defined to include all automobile

1 dealers that purchased new vehicles containing occupant
2 safety systems, that's subclass two.

3 THE COURT: But wouldn't that make sense that that
4 vehicle goes back to automobile dealers, automobile vehicles,
5 I mean, because you use one word and don't say automobile
6 vehicles?

7 MR. IWREY: Automobile includes trucks, Your Honor,
8 and I will show you in the complaint why it includes trucks,
9 Your Honor. As you will see in the next slide, these
10 definitions were taken from the dealers' consolidated amended
11 complaint. In paragraph 90 of that complaint the dealers'
12 class -- punitive class was defined as all automobile dealers
13 that included vehicles or that had purchased vehicles
14 containing OSS. If the dealers wanted to limit the
15 settlements to dealers of cars or SUVs or small trucks like
16 Rush claims they would not have used the broad term vehicles.
17 In fact, going back one slide, if you will, if they wanted
18 to -- back two. If they want to exclude people from the
19 settlement, exclude types of vehicles, there is an exclusion
20 clause right here in this definition of the settlement class.

21 Instead, Your Honor, they use the broad term
22 vehicles but in addressing your question, Your Honor, the
23 dealers went a step further and explicitly defined the
24 vehicles to be all encompassing. Note one on page 3 of the
25 complaint states that vehicles means any new vehicles

1 purchased by automobile dealers throughout the United States
2 including, but not limited to, sedans and most importantly
3 for this motion trucks and sport utility vehicles. They did
4 not say large trucks, small trucks, they said trucks, and
5 trucks means trucks. To imply a limitation here based on an
6 artificial dividing line contrary to the express language of
7 the agreement in the complaint is not permitted by Michigan
8 law.

9 The TRW and AutoLiv settlement classes were
10 preliminarily approved by Your Honor on July 8 and October 29
11 and a stay order was issued. Just recently on December 7 the
12 Court granted final approval of these settlements and final
13 judgment dismissing all claims. It is our position that the
14 Rush dealer plaintiffs and their proposed class are all
15 members of the classes that were approved in these
16 settlements, so their separate claims are now stayed and
17 precluded.

18 THE COURT: What do you think is the effect that
19 the auto dealers didn't object when Rush came in and filed
20 their own suit and had their own lead counsel, why do you
21 think that happened?

22 MR. IWREY: We weren't -- first of all, we were not
23 parties to the case at that time, number one. Number two, as
24 you know, Your Honor, lots of arrangements are made between
25 different classes on the plaintiffs' side.

1 THE COURT: Yeah, but this is more than an
2 arrangement, this is a formal filing of a pleading.

3 MR. IWREY: I understand, and probably at that
4 time -- I can't -- I can't tell you why the dealer plaintiffs
5 did not object. Certainly if I were there I would have
6 objected based on the settlements, but at that time OSS was
7 not part of the claim -- was not part of the Rush actions at
8 this time.

9 THE COURT: Was not part of the Rush actions?

10 MR. IWREY: OSS was not in there when the Rush
11 plaintiffs sought to be appointed as class counsel.

12 THE COURT: Well, they filed for what, wire harness
13 and bearings?

14 MR. IWREY: They filed first for wire harness --

15 MR. PARKS: First for bearings.

16 MR. IWREY: First for bearings, and then next for
17 wire harness, and then months and months later, approximately
18 11 months after preliminary approval of the settlements, they
19 filed for OSS, and it could be for the cases that have not
20 yet been settled and where classes have not been approved
21 they may be able to amend so the classes would be consistent
22 with each other, but because our settlement agreements were
23 signed and approved by Your Honor they are sort of fixed, so
24 for the other cases it may be just a matter of amending, but
25 for here where our classes were fixed the stay order and the

1 preclusion order and the final settlement applies.

2 THE COURT: Well, wait a second. The settlement
3 classes were fixed in May and September?

4 MR. IWREY: When the settlement agreements were
5 signed.

6 THE COURT: Right. And after that -- wasn't it
7 after that that Rush then filed their complaint?

8 MR. IWREY: No, after that Your Honor approved --

9 THE COURT: Oh, it was in August that they filed
10 their complaint, Rush filed?

11 MR. IWREY: I think it was approximately June of
12 2015.

13 THE COURT: I've got August of 2014, what was that?

14 MR. IWREY: August of 2014 may have been wire
15 harness.

16 THE COURT: Wire harness?

17 MR. IWREY: Yeah.

18 THE COURT: Rush filed wire harness?

19 MR. IWREY: Yeah, but the complaint here --

20 MR. PARKS: I believe we filed the complaint in OSS
21 on June 5th, 2015, and, Your Honor, I believe you are correct
22 that we filed probably bearings as the initial filing some
23 point in 2014, later 2014.

24 THE COURT: Okay.

25 MR. PARKS: And wire harness was shortly

1 thereafter.

2 THE COURT: Okay.

3 MR. IWREY: So frankly TRW and AutoLiv present
4 unique circumstances because the classes were fixed and also
5 preliminarily approved before Your Honor long before --
6 11 months before the complaints were filed by Rush in OSS, so
7 that's why it is somewhat unique.

8 The next item, I would like to look -- address
9 Rush's argument, it is only argument that they are not
10 automobile dealers. First, let's look at your -- the Court's
11 own definition of the term automobile dealer. On
12 September 23, 2015 Your Honor issued an order that authorized
13 the sending of a notice to an -- of a number of dealer
14 settlements, I recall there were around ten, including TRW
15 and AutoLiv. The notice was submitted to the Court and sent
16 by the dealers, but it was issued in the name of this Court
17 as required by Rule 23. That notice appears in docket entry
18 110 in Case No. 0602. The notice was directed to, as you
19 will see in the highlights, dealers who during the time
20 periods -- the relevant time periods purchased a vehicle that
21 contained one or more of the following parts and that
22 includes OSS.

23 The notice specifically defined the term dealer and
24 automobile dealer as follows: An entity or person authorized
25 to engage in the business of selling or dealing in new

1 vehicles at retail in the United States. So their dealer is
2 specifically tied to vehicles and vehicles is used in the
3 broadest sense, so it would be any entity that sells any
4 vehicle. There was no limitation about vehicle types, and
5 this is entirely consistent with our position that automobile
6 dealer was not intended to limit the persons or entities in
7 the dealer classes based on what vehicles they sell, rather
8 by definition an automobile dealer is a dealer of vehicles
9 particularly if you use the term automobile or automotive,
10 self-propelled or motorized vehicles.

11 In the Court's final approval order and in the
12 final fairness hearing Your Honor specifically noted that the
13 notices were, quote, in plain and easily understood language
14 and, quote, well informed the recipients of what was going
15 on. I cite the approval order, again, in this case, 0602, at
16 paragraph 7, and the November 18th transcript at page 36.
17 Given this easily understood language it is obvious that any
18 entity that sold new vehicles was included in the settlement
19 class.

20 Now Rush concedes that what it is selling is
21 vehicles. Rush is an entity and therefore by definition it
22 fits within the Court's definition of automobile dealers.

23 THE COURT: Is it consistent with the auto dealers'
24 position?

25 MR. IWREY: Not in the affidavit that was estimated

1 a year --

2 THE COURT: Mr. Cuneo's affidavit?

3 MR. IWREY: Mr. Cuneo's affidavit that was
4 submitted a year after the settlement agreements were
5 negotiated and certainly, I will get to that, certainly
6 inconsistent with the position that the automobile dealers
7 took in the settlement agreements and throughout the course
8 of litigation in this case.

9 THE COURT: Okay.

10 MR. IWREY: And used somewhat equivocal language as
11 I will note.

12 So what does Rush argue? Now that we know how the
13 Court defined the term automobile dealers let's look at what
14 Rush argues is an automobile dealer. Rush's punitive class
15 is defined of dealers of medium duty, that's class 4 -- not
16 classes in class action but class 4 through 7 medium-duty
17 trucks and heavy-duty class 8 trucks and other vehicles such
18 as buses, commercial vehicles, and then they exclude
19 automobiles, light trucks, vans, SUVs sold by automobile
20 dealers.

21 THE COURT: Obviously they were trying to
22 distinguish themselves from the auto dealers?

23 MR. IWREY: They were obviously trying cut themself
24 a piece of the pie in an already settled case. It fails.
25 Rush wants the Court to believe that there is some magical

1 line between its class and the dealers; settlement class
2 based on size and types of vehicles purchased and sold. This
3 is inconsistent with the dealer complaint. As you recall in
4 footnote one it said any vehicles, and it said trucks. It
5 didn't say large trucks, it didn't say small trucks, but all
6 trucks. It is also inconsistent with the Court's definition.

7 Let's take a closer look at this --

8 THE COURT: Did you provide information about these
9 trucks in discovery?

10 MR. IWREY: Absolutely -- well, we didn't get to
11 the discovery because we settled, but in the cooperation
12 provision with the auto dealers and in the settlement
13 negotiations TRW provided data about all of its sales, not
14 limited to any vehicles, all of its sales.

15 So recall the dealer complaint talked about trucks
16 without any limitation, but what Rush claims is trucks really
17 only means certain trucks, more specifically Rush suggests
18 that the settlement classes in dealer complaints somehow
19 didn't include class 4, 5, 6, 7, 8 trucks. Again, that
20 definition is nowhere in the record in the dealer case.

21 Let me put some more meat on the bones just to show
22 how implausible this distinction is. The class numbers, that
23 is class 4, 5, 6, 7 and 8 referred to by Rush, are
24 established by the Federal Highway Administration and based
25 on something called gross vehicle weight rating, which means

1 the vehicle curb weight plus the cargo capacity. So class 1
2 through 3 trucks are rated at 14,000 pounds and below; class
3 4 through 8 trucks are rated at 14,001 pounds and more. So,
4 for example, a class 4 truck is 14,001 pounds to
5 16,000 pounds, a class 5 is 16,001 pounds through 19,500, and
6 so on. So somehow there is this magical line of trucks at or
7 below 14,000 pounds which Rush says aren't trucks but are
8 automobiles, and those rated at class 4 and above 14,000
9 pounds that Rush says aren't automobiles.

10 THE COURT: Do any of the named plaintiffs sell
11 these class 4 to 8 trucks?

12 MR. IWREY: Yes, Your Honor -- any of the named
13 plaintiffs in which case?

14 THE COURT: In the ADP case?

15 MR. IWREY: Yes, Your Honor, absolutely. We
16 provided you evidence of this, one of the named plaintiffs --

17 THE COURT: You talked about one dealership up
18 here.

19 MR. IWREY: That is a class member, a member of the
20 auto dealer class that sells class 8 Ford trucks rated at
21 37,000 pounds, and another dealer, a named dealer, this is
22 those that we know about, I would contend that most dealers
23 do sell class 4 and above trucks but the one we were able to
24 find out is Lee Summit, which is one of the largest named
25 plaintiffs, and Lee Summit happens to sell that's a

1 Dodge 5500 truck that is rated at 18,000 pounds, a class 4 --
2 excuse me, maybe a class 5.

3 MR. PARKS: Class 5.

4 MR. IWREY: It is a class 5 truck. Thank you.

5 That is a named plaintiff that sells one of the trucks.

6 THE COURT: And because they sell these trucks does
7 that mean necessarily they are included in the class? I
8 mean, you know, you might have a class of Honda dealers but
9 the dealership might also sell -- I don't know --

10 MR. IWREY: They sell --

11 THE COURT: -- Toyotas.

12 MR. IWREY: I'm sure Lee Summit sells all types of
13 vehicles as you will see; Chrysler, Dodge, Jeep and Ram. The
14 problem is it defines it as dealers that sell vehicles. If
15 you use Rush's definition, they are a truck dealer that sells
16 vehicles so they are in the Rush class if you use the dealer
17 definition, so the Rush line makes no sense, it is going to
18 have overlapping classes. But more -- also just as critical,
19 this magic line, this 14,000 pound line, appears nowhere in
20 the dealer complaint and frankly nowhere else in the record.
21 Recall that the dealer complaint again says any new vehicles
22 including, but not limited to, trucks, that's all trucks.
23 The complaint talks about claims relating to trucks and
24 vehicles and we settled on these broad words which are
25 conclusive evidence of our intent under Michigan law. We

1 would have rejected anything else.

2 And to talk about Mr. Cuneo's affidavit. Your
3 Honor, I was there, I negotiated the TRW settlement. There
4 was never any discussion of this magical 14,000 pound line,
5 there was never a discussion of the Federal Highway
6 Administration truck classes. There was never a discussion
7 of truck weights. There was no discussion of any limitation
8 about the types of vehicles or the types of dealers covered.
9 Again, we --

10 THE COURT: You couldn't have discussed Rush
11 because you didn't know about it?

12 MR. IWREY: We didn't know about it, that's exactly
13 right. I will tell you if they -- I know, I deal in the
14 automotive industry all the time, I know what a vehicle is, I
15 know what an automobile is, they are very broad terms, and
16 what matters most are the words in those documents. If they
17 came back and said no, we are only talking about small trucks
18 I would have said nothing doing. So Rush can't come in after
19 the settlements are signed and approved by the Court and now
20 claim that the Court should provide a different magical line
21 definition that is nowhere stated in the record and
22 contrary --

23 THE COURT: Wait a minute. So if you included
24 everything and automobile dealers only included automobile
25 vehicles of less than a certain weight, so did you have a

1 meeting of the minds then?

2 MR. IWREY: We absolutely did because the meeting
3 of the minds are expressed in the clear words. The fact that
4 one party may have an irrational understanding after the
5 fact, but I will show you evidence that they didn't have that
6 understanding in contemporaneous positions that they took.
7 We did, in fact, have a meeting of the minds. The Rush
8 dealer -- excuse me, the auto dealers, they have known about
9 this motion all the time, if they wanted to cradle our
10 settlement they would have came in and said there is no
11 meeting of the minds but they stood before your court -- the
12 Court last month and sought final approval. And remember,
13 Your Honor, that provision that's specifically mentioned in
14 the judgment, the motion that we are arguing here today, so
15 the only thing that might matter is possibly more notice but
16 there was a meeting of the minds and it was finally approved
17 by the Court.

18 Rush's response I think concedes our point because
19 they cite at page 10 that defines the term automobiles as to
20 the term used in the OSS complaint at paragraph 2. That
21 paragraph makes reference to, quote, automotive vehicles and
22 further defines the term vehicles to be all new vehicles
23 including, but not limited to, trucks.

24 Another reason why Rush's position is invalid is,
25 of course, the definition of the phrase automobile dealers

1 that was specified by the Court in the Court-issued notice,
2 again, that was submitted by the dealers. Rush can't get
3 around this definition. The Court's notice made --

4 THE COURT: Wait a minute. I want to go back to
5 that definition.

6 MR. IWREY: Sure.

7 THE COURT: Tell me again where you said that
8 definition is?

9 MR. IWREY: It is slide number six.

10 THE COURT: But when you were quoting you said
11 including -- I thought you said something about including
12 trucks?

13 MR. IWREY: That was Rush's -- excuse me, that was
14 the dealers' definition in the dealer complaint and that is
15 paragraph 90 of the dealers' complaint, slide 4.

16 THE COURT: Slide 4?

17 MR. IWREY: Yes, including, but not limited to,
18 trucks. Your Honor, seeing that it said any vehicles and
19 trucks there is no way that the dealers contend that there
20 was any limitation. Again, when the dealers submitted the
21 definition, the plain English definition, to your court, they
22 didn't put any limitation on the term vehicles.

23 Rush attempts to define the word automobile out of
24 context and it is not supported by the dictionary termed
25 definition. The phrase we are defining here is automobile

1 dealer. When used as an adjective automobile it is
2 undisputed that the dictionaries define it as of or relating
3 to self-propelled vehicles, that's consistent with our
4 definition in this case.

5 Rush cherry-picks noun definitions of automobile
6 dealers but even if you believe those definitions they
7 provide no support for the 14,000 pound dividing line and
8 Rush cites no definition that says an automobile is something
9 with a gross vehicle weight rating of 14,000 and above, that
10 it is a truck, and Rush's definition is not supported by the
11 record.

12 Now, even if we go beyond the record, and this is
13 really interesting, Your Honor. If we go beyond the
14 record --

15 THE COURT: Wait a minute. When we go to those
16 definitions do we include other vehicles like --

17 MR. IWREY: Motorized.

18 THE COURT: Riding mowers, what do you call them?
19 Riding mowers, you know, those big things?

20 MR. IWREY: That is a motorized self-propelled
21 vehicle but probably beside the point because those don't
22 really have seat belts or the steering wheels or air bags so
23 probably not an issue.

24 THE COURT: Not in this instance.

25 MR. IWREY: Right, same with mining equipment,

1 probably not an issue. Obviously, you know, trucks are going
2 to be the big issue.

3 So let's look at how Rush portrays itself to the
4 public. Let's look at Rush's annual report, this is its 2014
5 annual statement. It says that its dealerships are motor
6 vehicle dealers and cites to the Automobile Dealers Day in
7 Court Act. Looking at the Automobile Dealers Day in Court
8 Act the definition in that statute means any person,
9 partnership, corporation, association, et cetera --
10 continuing on -- engaged in the sale or distribution of
11 passenger cars, trucks or station wagons. Definition
12 includes all trucks. In fact, the Carole Kenworth truck case
13 that we cited in our initial brief holds that the very
14 largest class A trucks are, in fact, automobile dealers under
15 the act.

16 Rush in its response says the act doesn't mean that
17 trucks and equipment are automobiles, I'm quoting its
18 response, and I would agree with that, Your Honor, but that's
19 besides the point. The act doesn't define the term
20 automobiles at all. The term at issue here is automobile
21 dealers, not automobiles, and the act does define that term
22 to mean a person or entity that sells trucks, and that would
23 include the Rush punitive class. So based on that definition
24 and based on the Rush annual report the class consists of
25 automobile dealers and are covered by settlement, but that's

1 not all.

2 Rush admits, and this is in discovery that was
3 produced in the bearing case, and Mr. Parks is allowing me to
4 read this for the record. There was an interrogatory that
5 asked to identify all trade and regular press that you read
6 occasionally or routinely and any trade associations to which
7 you belong. Rush's answer: Subject to the objections and
8 general objections above, plaintiff states that Rush
9 Enterprises, plaintiff's parent corporation, is a member of
10 the following organizations and receives publications
11 distributed by these organizations; Alabama Dealers
12 Association -- the Alabama Dealers Association of Alabama,
13 the Arizona Auto Dealers Association, Arizona Truck Dealers
14 Association, California New Car Dealers Association, Colorado
15 Automobile Dealers Association, Florida Automobile Dealers
16 Association, Georgia Automobile Dealers Association. You get
17 the point, Your Honor, it lists over 20 automobile dealers'
18 associations and significantly it also lists the National
19 Automobile Dealers Association and the American Truck Dealers
20 Association. The National Automobile Dealers Association and
21 these state associations represent as they claim dealers of
22 cars and trucks. Cars and trucks are subsets of automobiles.

23 Rush tries to say that there is some significance
24 to its membership in the American Truck Dealers Association
25 and I agree, that's because the American Truck Dealers

1 Association is simply a subdivision within the American
2 Automobile Dealers Association. Truck dealers are a
3 particular type of automobile dealers but they are still
4 automobile dealers, and as I mentioned before, Rush is a
5 member of the National Automobile Dealers Association.

6 Excuse me. May I grab a drink, Your Honor?

7 THE COURT: Yes.

8 MR. IWREY: Thank you, Your Honor.

9 Rush submits the parole evidence in support -- in a
10 response in the form of the declaration by dealers' counsel.
11 This should not be considered given that the language of the
12 dealer and settlement agreements -- the dealer settlement
13 agreements is plain and ambiguous and does not permit Rush's
14 magical dividing line. The law is quite clear that parole
15 evidence cannot be used to prove an intent different from the
16 plain meaning of the document, and recall, Your Honor, in
17 responding to the notice held specifically that that was
18 plain and easily understood English. I will cite to
19 Burkhardt, B-U-R-K-H-A-R-D-T, vs. Bailey, 680 Northwest
20 Second 453, at 454, and Harbor Park Market vs. Gronda,
21 G-R-O-N-D-A, 743 Northwest Second 585, at 589.

22 Let's take a look specifically at the declaration.
23 It states that the dealers, quote, did not understand the
24 term automobile dealer in the AutoLiv and TRW settlement
25 agreements to include dealerships of, among other things,

1 medium or heavy-duty trucks or the other vehicles. That's
2 really interesting language. They said we didn't understand,
3 they didn't say that automobile dealer doesn't include those
4 but we didn't understand, and the declaration is contradicted
5 by the evidence.

6 First of all, the declaration is not
7 contemporaneous evidence of what was intended when the dealer
8 agreements were signed. They were made a year after the
9 settlement agreements were finalized, and apparently and
10 after our motion obviously and apparently only after some
11 behind the scene communication between dealers' counsel and
12 Rush's counsel.

13 Second, prior and subsequent communications to this
14 Court by dealers' counsel contradict this declaration. First
15 of all, as you recall, the notice submitted to the Court for
16 the dealers' settlements did not have this magical line of
17 14,000 pounds or any limitation. In fact, nothing anywhere
18 else in the record in the dealer case was this limitation set
19 forth. You would think that if the dealers did not intend
20 their class to include these big class 4 trucks and above
21 they would have said it to the Court, they would have said it
22 to me, they would have said it to the other defendants, they
23 would have said it in their complaints or their settlement
24 agreements, or they would have said it in their notice, they
25 didn't say it anywhere. To the contrary --

1 THE COURT: But they didn't object to the truck and
2 equipment plaintiffs coming in as a punitive class, I mean --

3 MR. IWREY: They didn't object.

4 THE COURT: -- it seems like they recognized it?

5 MR. IWREY: But the settlements weren't finalized
6 and again we weren't present and one never knows what goes on
7 among counsel, and it could be that -- you will notice, Your
8 Honor, also in the new complaints that --

9 THE COURT: We talked about it at an MDL
10 conference. I mean, I don't know how we can talk about this
11 and this didn't come up?

12 MR. IWREY: Well, fortunately or unfortunately I
13 wasn't there, and the new complaints, and I am sure you will
14 see the amendments, the new complaints that are filed at
15 least by the end payors has some very specific definitions of
16 vehicles. So I would expect now that this issue, this
17 limited issue involving TRW and AutoLiv, is brought up, there
18 may be some separation in the class, that separation can't
19 happen after a settlement agreement is signed and approved by
20 the Court, it is too late.

21 There have also been -- this is interesting, Your
22 Honor. In our notice of supplemental authority that we
23 submitted two weeks ago the dealers did, in fact, represent
24 explicitly to the other defendants in this MDL that the types
25 of vehicles that are in the Rush case are included in the

1 dealer case. They sent a letter on March 31st, 2014 to the
2 wire harness defendants.

3 THE COURT: And that was the direct purchasers'
4 order?

5 MR. IWREY: No, no, Your Honor, it wasn't. On
6 March 31st that letter was signed by all counsel.

7 THE COURT: Let me take a look at that.

8 MR. IWREY: I think that's Exhibit Number 1 to our
9 notice of supplemental authority. It was signed by all
10 counsel including dealers' counsel. We could provide you --
11 here we go, if you look at the fourth page of that exhibit it
12 includes Mr. Moskovitz, who is the direct purchaser,
13 Mr. Williams, who as you know is the end payor, and
14 Shawn Raiter, who is the auto dealer.

15 THE COURT: The fourth page of that? Hold on.

16 MR. IWREY: Exhibit A, I'm sorry.

17 THE COURT: I have Exhibit A but I only have one.

18 MR. IWREY: There is a redacted --

19 THE COURT: I don't have the redacted.

20 MR. IWREY: Okay. I can show you.

21 THE COURT: You can tell me, I believe you.

22 MR. IWREY: At the bottom of the fourth page it has
23 the signature lines.

24 THE COURT: So when it says in the letter, the
25 March 31st letter, the letter is sent on behalf of direct,

1 end payor and automobile plaintiffs?

2 MR. IWREY: Yes.

3 THE COURT: And you're saying each of them signed?

4 MR. IWREY: Each of them signed, and it said that
5 plaintiffs' classes regard the case to cover products sold to
6 any vehicle manufacturers including, for example, the
7 producers of commercial trucks and recreational vehicles. It
8 squarely rebuts and, in fact --

9 THE COURT: Is there a separate definition of
10 commercial truck?

11 MR. IWREY: I'm sure there are --

12 THE COURT: I'm learning more about these than I
13 ever wanted to know but go ahead.

14 MR. IWREY: I think the Court could use fewer
15 definitions of terms like vehicles and trucks, but commercial
16 trucks certainly means -- certainly includes the larger
17 trucks that are included in the Rush punitive class. I can
18 also tell you that the discovery requests that were the
19 subject of this letter didn't talk about passenger cars and
20 light trucks, it said all documents relating to prices of
21 parts for motor vehicles, all documents relating to impact on
22 parts or prices for parts sold to motor vehicles or vehicles.
23 They were very broadly worded. So contemporaneously they
24 were saying give us everything, that's what these cases
25 involve. The later letter that we sent -- that we included

1 that also gave the statement that it is not limited to --
2 excuse me for one second.

3 THE COURT: That's the one that is from the direct
4 purchasers?

5 MR. IWREY: Yes, it said it is broader than
6 automobiles and includes wire harness products sold for
7 manufacture into any motor vehicle. That was only signed by
8 the direct purchasers and Ford because at the time the
9 recipient of this letter had settled or at least preliminary
10 settled with the end payor and automobile dealers but it
11 still makes reference to the term class plaintiffs and class
12 plaintiffs as used in a prior letter includes everybody. So
13 it is clear from both of these letters that there was no
14 restriction when it came time to defining what their case was
15 about back then.

16 Finally, Your Honor, not only is the Rush magic
17 dividing line not supported by the record or the extrinsic
18 evidence, when one looks at the facts it leads to absurd
19 results. Rush says in its response that they are distinct
20 dealers and crafted its class to avoid overlaps. This is
21 wrong. As we've seen, the dealer class includes all trucks
22 and vehicles, so it is a hundred percent overlap. Let's look
23 at the facts even if we look at this 14,000 pound dividing
24 line the overlap doesn't disappear.

25 Rush contends that a dealer that sells light trucks

1 is an automobile dealer. Well, guess what, here is what Rush
2 says in its website. When it comes to light- and medium-duty
3 trucks no one matches the inventory of Rush Truck Centers.
4 That's not all. Rush heavily promotes the sales of the
5 Ford F-150, a legendary vehicle around here, which is a
6 light-duty class 2A truck that is rated at 14 -- much less
7 than 14,000. So even under Rush's magic dividing line Rush
8 is, in fact, an automobile dealer.

9 Now let's look at the flip side. As we have seen,
10 the members of the dealer class sell class 4 through 8
11 medium- and heavy-duty trucks that are rated above 14,000
12 pounds, and this is the Lee Summit slide I showed you, and we
13 made reference to the Bob Maxey slide. This is Bob Maxey, a
14 member of the dealer settlement class that is just up
15 Jefferson from this Court that sells a massive class 8 truck
16 rated at 37,000 pounds. So what does this mean? Under
17 Rush's own definition Rush and the members of its class are
18 within the settlement classes, and many members of the
19 settlement classes are within the Rush punitive class, that
20 makes no sense.

21 There is no sense for another reason. Rush says at
22 page 15 of its brief that class 3 trucks are medium duty but
23 they are not a member of the Rush punitive class because the
24 Rush punitive class includes class 4 and above trucks.
25 According to Rush only light-duty trucks are covered by the

1 settlement agreements, so if you believe Rush's dividing line
2 definition dealers of class 3 trucks are not in this MDL at
3 all, they are nowhere.

4 Long before the cases were filed our settlement
5 classes were approved by the Court and the Court stayed all
6 further litigation. There is simply no basis to carve out
7 these -- to carve out a new settlement class or a new
8 punitive class from a class that is already settled, and if
9 Rush thinks it is unfair they have the opportunity to opt
10 out.

11 So in summary, Your Honor, our position is
12 supported by the plain meaning of the dealer settlements and
13 the dealer complaints, 100 supported -- 100 percent supported
14 by the plain English definition of automobile dealer that was
15 approved and already set out to the Court and to thousands of
16 people, and our position is 100 percent supported by the
17 contemporaneous statements and actions by the Rush plaintiffs
18 and the dealers.

19 On the other hand, this 14,000 pound dividing line
20 has no support from the documents, no support from the
21 dictionary, no support from the statutes and dictates absurd
22 results with overlapping classes.

23 And there is another reason. Your Honor, this
24 notice went out to 16,000 entities and 100,000 e-mails, it
25 says it covers entities that are authorized to engage in the

1 business of selling vehicles at retail. Wouldn't anyone who
2 sells vehicles understand that they are covered by these
3 settlements? Of course they would. If you allow Rush to
4 carve out a class here you would open up other floodgates for
5 other self-defining classes. For example, will there be a
6 new class of recreation vehicle dealers? Would there be a
7 new class of off-road and utility vehicle dealers? This
8 problem will not only impact OSS settlements but it would
9 potentially impact other parts cases including the 17 cases
10 that have already settled with the dealers. It would cause
11 this already sprawling litigation to drag on longer and
12 greatly complicate future settlements.

13 We ask that the Court enforce the simple plain
14 English definition that it already sent out. Its result is
15 dictated by the law, and for this reason we respectfully
16 request --

17 THE COURT: Let me ask you?

18 MR. IWREY: Sure.

19 THE COURT: The 17 other cases that you are
20 referring to that have been settled --

21 MR. IWREY: Yes.

22 THE COURT: -- are you saying that if this Rush
23 class is recognized then in all of those parts Rush -- now
24 Rush is only sued in the three parts, right?

25 MR. IWREY: Thus far.

1 THE COURT: Thus far.

2 MR. PARKS: Your Honor, we are now in six because
3 we filed a starters alternators complaint, if you count those
4 separately, and we filed a radiators, but you are correct in
5 the broader proposition.

6 THE COURT: Okay. So if there is some settlement
7 in one of these six parts, and I don't remember who settled
8 with who, but if there are settlements with one of these six
9 parts then now Rush can come in and say but we are not
10 included in that settlement?

11 MR. IWREY: That's right.

12 THE COURT: And --

13 MR. IWREY: And it is not just Rush but they see
14 that you can carve out a settlement that says dealers of
15 vehicles and then motorcycle dealers, recreational vehicle
16 dealers, whatnot, and they will all come in. That's why when
17 we negotiated this settlement we had the broad terms that
18 were used in the complaint.

19 THE COURT: Okay.

20 MR. IWREY: Thank you, Your Honor.

21 THE COURT: Thank you. Okay. Mr. Parks, what do
22 you have to say about this?

23 MR. PARKS: Something a little different I think,
24 Your Honor.

25 THE COURT: Now for the other side.

1 MR. PARKS: Your Honor, maybe we should start where
2 the prior discussion ended on the topic of absurd results,
3 and I think that what is particularly absurd is the notion
4 that a dealer of farm implements, of tractors, for example,
5 would be somehow considered an automobile dealer. Under no
6 normal interpretation of the English language that I'm aware
7 of could a dealer of tractors be an automobile dealer, yet
8 that's precisely what the artificially broadened definitions
9 being asserted by the movants here would suggest. Similarly,
10 a construction equipment dealer, a dealer of excavators and
11 bulldozers and Bobcat type vehicles, never sold car one or
12 SUV one would, according to the movants here in their
13 definitions, be an automobile dealer. That simply makes no
14 sense. Those are explicitly part of our class.

15 There has been a lot of discussions about trucks
16 and whether trucks are automobiles or not, and I will turn to
17 that in a second, Your Honor, but there is no regard for the
18 fact that our case is trucks and equipment. In fact, there
19 was a mention of off-road utility vehicles as some new
20 entrant that could come in and add itself to the litigation.
21 Well, I would say that the off-road utility vehicle segment
22 is already covered by our trucks and equipment definition so
23 I don't see that happening. So I think when we start talking
24 about --

25 THE COURT: Could your trucks be separated from

1 your heavy equipment?

2 MR. PARKS: Well, there will be dealers of heavy
3 equipment and dealers of trucks and they typically will
4 operate under different dealer agreements which --

5 THE COURT: But my question is could the dealers of
6 the trucks be included in the settlement and the dealers of
7 the heavy equipment not?

8 MR. PARKS: Well, I don't think you could do that
9 because the definitions that the movants are suggesting are
10 such that if you accept them they are so broadly worded that
11 they would include tractors and construction equipment and
12 mining equipment and so forth.

13 A brief word about that, by the way. To use the
14 word of the riding tractor and counsel's response for the
15 movants was well, there aren't seat belts. Well, there are
16 passenger restraints in mining equipment, there are passenger
17 restraints in tractors, there are passenger restraints in
18 construction vehicles, so this is an issue. They can't just
19 sidestep it by saying there aren't seat belts in riding
20 mowers, that may be true but that doesn't really address the
21 broader point.

22 THE COURT: And were your dealers given notice, I
23 mean, was Rush --

24 MR. PARKS: Yes, Your Honor, I have received no
25 word from in-house counsel at Rush that they received notice

1 of this settlement so as far as I know they have not. It
2 certainly was not provided to us as counsel for Rush. I can
3 speak to the Freightliner issue briefly because I am
4 generally aware. Freightliner in addition to selling medium-
5 and heavy-duty trucks sells what you might consider a very
6 souped-up pickup truck, it kind of looks like a truck but it
7 has kind of been shrunken down to maybe a Hummer-size vehicle
8 but it is the front of a pickup truck, it looks like an
9 actual truck just a much smaller version, and it has a bed on
10 the back like a pickup truck. I suspect that has a lot to do
11 with why those dealers received notice because Freightliner
12 sells these smaller trucks.

13 Now, one of the things Mr. Iwrey said, that he's
14 very familiar with the automotive industry and he's been
15 around it a long time, I have as well, and I know from my
16 work and he probably does too, that the reason -- I can say
17 the reason we drew the dividing line where we did is because
18 we were aware that the dealer agreements, for example, for
19 Ford, or various General Motor brands where the products
20 include -- products manufactured by the company include big
21 trucks and much smaller passenger vehicles they have
22 different dealer agreements for those products. If you are a
23 Ford car dealer you have the ability to sell light trucks
24 under the dealer agreement. You need a separate dealer
25 agreement to sell Ford commercial trucks, and that's why we

1 drew the line where we did because in our experience the
2 class 3 trucks, although classified by the Federal Highway
3 Safety folks as a medium-duty product, I know that you can
4 typically go get an F-350 pickup truck at a Ford dealer
5 that's not a Ford truck dealer. So the reason we drew the
6 line where we did is more of a function of the reality and
7 the space that the dealer agreements for the types of brands
8 that sell bigger commercial vehicles and passenger type
9 vehicles, cars and light trucks, SUVs, passenger vans and
10 that sort of thing.

11 THE COURT: When you drew that line and you came in
12 the case after some settlements, did you have contact with
13 other -- with the auto dealers plaintiffs and say we are
14 doing this -- we are taking over all the cases over whatever
15 thousand pounds, did that happen?

16 MR. PARKS: We didn't say that because we weren't
17 taking them over. No one -- the reason we filed their claims
18 was because no one had asserted these claims yet in any of
19 these cases. We did alert the plaintiffs' counsel for the
20 automobile dealers that those cases will be filed. And
21 somewhat surprisingly, if you believe that their case already
22 included us, they raised no objection to us filing those
23 complaints and indeed stood by and supported our motion to be
24 named as lead class counsel in bearings and have incorporated
25 us in the proceedings. Now, that's not the typical behavior

1 of plaintiffs' class counsel who don't usually really like
2 people horning in on their claims and taking part of their
3 class away.

4 THE COURT: Well, could it be that they had already
5 settled with these defendants and they then say oh, we have
6 an opportunity here to get a greater share of the pie, in
7 other words, we only have to distribute this amongst
8 passenger vehicles versus trucks.

9 MR. PARKS: I can't speak to that motivation but I
10 can say this, Your Honor, it is very interesting, there are
11 settlements in wire harness, there are settlements in
12 bearings with the automobile dealer plaintiffs, they haven't
13 come forward to file a motion like this and say wait a
14 second, all of this stuff about these truck classes, we
15 already settled those cases. Now, you would think they would
16 if they thought that their settlements which were basically
17 the same as the settlement here with the example same type
18 class definition, you would think those defendants would have
19 plenty of motivation to come forward and object, they didn't,
20 they didn't object to our motion to be appointed interim lead
21 class counsel for the truck and equipment dealer class, they
22 didn't object and say we need to move to stay this proceeding
23 in bearings and wire harnesses because we have already
24 settled those cases. Interesting they not only didn't
25 object, they have actually filed motions, as Your Honor knows

1 because you're presiding over them right now, they filed
2 motions to dismiss our complaint not on the grounds that it
3 was taken care of by a settlement but on the grounds that it
4 was untimely, and if it was untimely it must not have been
5 part of the complaint filed by the automobile dealer
6 plaintiffs because if it had been part of that we would have
7 been timely, right, because we would have been within that
8 class and we would have been entitled to the benefit of
9 tolling in those cases. So we are really actually finding
10 ourselves on both ends of this in a negative way; we are
11 receiving motions from wire harness defendants saying you are
12 not in time, and here we are having a motion saying I'm
13 sorry, your case is already part of a settlement that has
14 happened. Now, we can't be both, I don't see how we can be
15 both.

16 THE COURT: Well, I wonder about the auto dealers,
17 the other auto dealers, what they are saying about this
18 motion. I mean, they should have -- it is going to impact
19 them one way or the other in the future.

20 MR. PARKS: We know what they are saying about this
21 motion because they have gone on record with a declaration
22 from Mr. Cuneo and said that he didn't understand that the
23 settlement included truck dealers or heavy equipment dealers.

24 THE COURT: Well, that bothers me, he didn't
25 understand that, he was counsel?

1 MR. PARKS: He was, yes.

2 THE COURT: This counsel says it is clear we
3 understood it, and I asked the question is there a meeting of
4 the minds, and if there is not a meeting of the minds do we
5 set aside this settlement?

6 MR. PARKS: Well, Your Honor, I don't -- I can't
7 speak to that, but I can speak to the fact that I would argue
8 exactly 180 degrees the opposite of what moving counsel
9 argues here. The case says that the settlement class is
10 automobile dealers. There's a lot of discussion of what
11 vehicles they purchased, and that includes truck, but the
12 defining characteristic for the class is automobile dealers,
13 so what is an automobile dealer? They go through a series of
14 definitional machinations to get to the point of saying an
15 automobile dealer is any dealer who sells any self-propelled
16 vehicle but that can't possibly be logical because that
17 includes tractor dealers, includes bulldozer dealers and
18 that --

19 THE COURT: Well that --

20 MR. PARKS: -- includes mining equipment dealers.

21 THE COURT: That's very true, but in the letter of
22 March 31st, 2014 there is a note specifically that it should
23 include -- this is on the wire harness, wire harness products
24 sold to any motor vehicle manufacturer including, for
25 example, commercial trucks and recreational vehicles. Why do

1 you need that clarification?

2 MR. PARKS: There is, Your Honor, and I will
3 explain a couple things about it. First of all, the letter
4 does come from Mr. Moskovitz' letterhead and obviously was
5 signed by representatives of the three different groups
6 referenced in the first paragraph. I would note that when
7 counsel made his presentation, counsel for the movants, he
8 used the phrase plaintiffs' classes regard the case to
9 include. I don't know if he was meaning to quote from the
10 letter but what the letter says is class plaintiffs reiterate
11 that the definition of wire harness products should include
12 wire harness products sold to any motor vehicle manufacturer
13 and so forth.

14 Now, here is the thing, when you have got a group
15 of plaintiffs writing and they have asserted slightly
16 different breadth of claims, we know the direct purchaser
17 plaintiffs are including commercial OEMs in the commercial
18 vehicle OEMS in their definition, I believe they have an RV
19 dealer as a class representative as well, so obviously the
20 direct purchaser plaintiffs are specifically motivated to see
21 that the wire harness discovery is broad enough to include
22 those types of -- or products for those types of vehicles.
23 The letter doesn't distinguish between those variations and
24 that's understandably so, it was a group letter and
25 inevitably you would default to the broadest definition and

1 that's also in honor of your Court's directive to the parties
2 to try to deal with discovery on a consolidated basis.

3 They could have perhaps more accurately said well,
4 the direct purchaser plaintiffs want it for commercial
5 products, the auto dealers they don't need that broadly, but
6 in a joint letter like this and in the scope of a discovery
7 discussion and in the context of a case like this you
8 typically don't start dividing it up that way, and there is
9 nothing about this letter that says anything about the auto
10 dealer plaintiffs asserting claims on behalf of some broader
11 group.

12 I would also point that this -- point out my point
13 is about the second letter from June 10th that doesn't
14 involve the auto dealers at all and still the same definition
15 comes up, and that I think goes to the point that really what
16 is going on here is that you have got parties like Ford which
17 makes big trucks and cars, you have got parties like the
18 direct purchaser plaintiffs who are asserting claims on
19 behalf of cars OEMs and truck OEMs and they are -- and RV
20 OEMs, and they are simply pointing out that they want
21 discovery of that breadth. To try to read into that letter
22 and then have it control this whole outcome of this dispute
23 including what was in a totally separate settlement agreement
24 that the auto dealer plaintiffs were really admitting on this
25 letter on Mr. Moskovitz' letterhead and basically which

1 defaults to the broadest common denominator of discovery
2 being sought by the parties that somehow now means that
3 the auto dealer plaintiffs really aren't being forthright
4 when they say we thought our case was only about auto
5 dealers, not truck dealers, not heavy equipment dealers, not
6 farm implement dealers.

7 I just don't think that's a fair interpretation of
8 the letters, and I think it is a real stretch. And if
9 anything, Your Honor, I would argue it shows how weak the
10 movant's position is that they have to point to a letter like
11 this which has really nothing to do with anything here and
12 argue that's the grand silver bullet.

13 THE COURT: What about in the dealership
14 consolidated class complaint where it has a footnote about
15 vehicles meaning including, but not limited to, sedans,
16 trucks and sport utility vehicles?

17 MR. PARKS: I think that the point that moving
18 counsel is not focusing on is the earlier part of that
19 sentence where it says any new vehicles purchased by
20 automobile dealers, so we understand that there will be some
21 dealers who primarily sell automobiles who also have
22 franchise agreements to sell larger trucks, and we have seen
23 some examples of that that have been handpicked by the moving
24 party, that's understandable. Similarly, you will have some
25 folks like certain Rush entities, not all, but certain Rush

1 entities that although they sell overwhelmingly heavy- and
2 medium-duty trucks they also have dealer agreements that
3 allows them to sell light duty pickups.

4 THE COURT: So Rush could be in the auto dealer
5 plaintiffs' case and in its own case for heavy --

6 MR. PARKS: Correct, certain of the Rush entities
7 could be in the auto dealer case because they sell light-duty
8 pickups, but there are many or vast majority of entities in
9 this case on behalf of the plaintiffs, the Rush entities,
10 don't even sell light-duty pickups, they only sell medium-
11 and heavy-duty trucks.

12 THE COURT: So when they come to class definition
13 we will come to this particular issue more specifically?

14 MR. PARKS: I think that's right, Your Honor, I
15 think that's exactly right. But I think that it can be
16 sorted out, these aren't irreconcilable by any means. An
17 automobile dealer is to me a dealer that sells primarily or
18 overwhelmingly automobiles, that's a very commonsense
19 definition to me. There is a distinct thing, a truck dealer,
20 they sell primarily overwhelmingly trucks, and Rush falls
21 into that category for sure. Then there are equipment
22 dealers who none of the prior discussion involves really who
23 sell tractors; there aren't a lot of tractor dealers who are
24 also selling sedans, there aren't a lot of bulldozer dealers
25 selling sedans.

1 THE COURT: Are there other large truck dealers
2 besides Rush, I mean, how many of those are there?

3 MR. PARKS: There are many, many, many.

4 THE COURT: There are many of them.

5 MR. PARKS: I mean, their brands alone we are
6 talking about Mack, Volvo, Kenworth, Peterbilt,
7 International, Freightliner, Hino, UD, Ford, GM, and the list
8 goes on.

9 THE COURT: And when you come to your class
10 definition you would include all of these, Rush's --

11 MR. PARKS: Absolutely, and we name them
12 specifically in our complaint on the truck side.

13 THE COURT: Okay.

14 MR. PARKS: So I would also just address briefly
15 the notice that has been pointed to. This is slide 5 --
16 slide 6, and I would just say that the notice is really a
17 function of a description of what the settlement agreement
18 says. As I understand what a notice does, it is simply
19 telling the world that there has been a settlement and
20 informing the world of the terms of that settlement. Now, I
21 think first of all the settlement agreement language
22 controls. The notice is an effort to describe that, but to
23 the extent the notice because people weren't aware of this
24 issue or weren't sensitive to it isn't carefully worded,
25 that's fine. I would also take issue with the idea that

1 anyone who read this language would realize -- for example, a
2 tractor dealer would read this and say, you know what, I'm an
3 automobile dealer for the purposes of this settlement.

4 Frankly I think they wouldn't.

5 I would be interested to know if any tractor
6 dealers were provided notice of this settlement and heavy
7 equipment dealers were provided notice. And I think -- we
8 see how that turns out and I suspect it will turn out that
9 they weren't and I think it will show, Your Honor, that that
10 is a pretty clear insight into the definition to why the
11 definition is being offered up to try to justify this after
12 the fact now by these sole moving parties despite all the
13 other settlements, similar language, no one else has come
14 forward, only the movants here have come forward to make
15 these arguments, and I think the definitions they offer lead
16 to these nonsensical results which show you that that can't
17 possibly be the right definition.

18 The final word I want to offer about the notice is
19 the timing of the notice. What's interesting is that the
20 notice language postdates the filing of our complaint. I
21 think it was represented that the notice was transmitted I
22 believe it was in September of 2015, our complaint was filed
23 in June, so in the interim between the settlement and the
24 notice our complaint is filed, and then a motive arrives for
25 the parties, particularly the defendants, to use some broader

1 language in the notice than was actually in the settlement
2 agreement. Uh-oh, didn't think about the fact that there are
3 these other guys out there, I better get a broader notice
4 language, make it real subtle, and then argue after the fact
5 that the settlement we signed, which doesn't have the same
6 language as the notice has, is broad enough and we will try
7 to bootstrap it back in. So I think the timing is
8 interesting with that.

9 I would offer this final point. The class here in
10 the settlement agreement and in the plaintiffs' complaint --
11 the auto dealer plaintiffs' complaint is defined as
12 automobile dealers. Through the various definitional
13 variations or interpretations offered by the movants here,
14 they have essentially tried to transform that language,
15 automobile dealer to motor vehicle dealer, but that's not
16 what the settlement says, and that's not what the complaint
17 said. The complaint talks about automobile dealers, and we
18 have to be dealing with automobile dealers. This effort to
19 try to say that, well, the Auto Dealer Day in Court Act
20 defines automobile dealers a certain way, okay if we are here
21 on an Automobile Dealer Day in Court Act claim, which we are
22 not.

23 To say that the National Automobile Dealers
24 Association has a subdivision, the American Truck Dealers, if
25 anything I think that supports our point that the truck

1 dealers are considered separate from automobile dealers and
2 several states have a similar distinction, but the reality is
3 many states aren't really big enough and there are not enough
4 differences in terms of lobbying, which is why those
5 organizations exist, to create a separate subdivision for
6 trucks. So in Georgia where Rush has a dealership but
7 doesn't sell any light-duty trucks at all, it is still a
8 member of the Georgia Automobile Dealers Association because
9 the lobbying done by that organization on behalf of auto
10 dealers often has an incidental benefit to truck dealers.

11 So there's a lot of simple and innocent and
12 sensible explanations for why these automobile dealer groups
13 include trucks within them, it is typically among other
14 things because there are many, many more automobile dealers
15 and they create the resources and the population for these
16 industry organizations to go, and membership is sort of
17 neither here nor there. My firm was a member of the American
18 Truck Dealers Association as an exhibiter at conferences, and
19 we attended the National Automobile Dealers Association
20 conferences as well, and it doesn't mean we are an auto
21 dealer or a truck dealer. So the membership point I think is
22 a complete red herring, and if anything the fact that there
23 is an ATD subdivision points out the distinction that exists
24 between truck dealers and automobile dealers.

25 If Your Honor has any further questions I will be

1 happy to address them?

2 THE COURT: No. Thank you. All right. Mr. Iwrey,
3 reply briefly.

4 MR. IWREY: I will reply on five or six points.

5 Number one, with respect to the letter I would like to submit
6 to the Court the discovery request in wire harnesses that
7 was, in fact, the subject of that request.

8 THE COURT: All right.

9 MR. IWREY: Let's read what the requests were. If
10 you look at page 2 -- I'm sorry, page 3, all documents
11 relating to OEMs, sales to their -- OEM sales to their
12 customer of vehicles and wire harness products, that's
13 request number 12. Request number 13, all documents relating
14 to the impact of wire harness prices on motor vehicle prices.
15 So Mr. Parks was saying that we want to say automobile means
16 motor vehicle dealers, we are not making it up, it is right
17 here in the dealers' own documents.

18 Secondly, Mr. Parks says that he wants a
19 commonsense definition of what automobile dealer, a
20 commonsense definition of automobiles. They don't provide a
21 commonsense definition that supports their line between heavy
22 and medium duty and light duty, it is not there. And, in
23 fact, if you want to look at the common sense this is what
24 the National Automobile Dealers Association say they are,
25 they were founded in 1917. They represent 17,000 new car and

1 truck dealers. Automobile means car and truck, which is
2 consistent with the complaint, which is consistent with the
3 settlement agreement.

4 Mr. Parks admits that there is, in fact,
5 substantial overlap between the class members of the
6 settlement classes and the Rush punitive class. You can't
7 say we can deal with it, that means that the class is poorly
8 defined. You can't deal with that overlap.

9 Mr. Parks states that the notice provision that was
10 issued by the Court postdates the filing of the Rush
11 complaints. He misstates that it was submitted by defendants
12 to the Court. Your Honor, it was submitted by the auto
13 dealer plaintiffs to this Court as part of the motion to
14 disseminate class notice, it was not submitted by the
15 defendants. And, in fact, the fact that it postdates the
16 complaint means that the truck dealers were aware of this
17 issue and were aware of the Rush complaint.

18 The other issue Your Honor asked about, notice and
19 whether it went to Rush, if you look at the motion for final
20 approval of the dealer settlement agreement it was published
21 very widely in extremely widely read publications, for
22 example, Crain's Automotive News, Auto Dealer Monthly, it was
23 posted on the websites including those on the National Auto
24 Dealers Association. Can I approach the Court? When I was
25 looking about what the National Auto Dealers Association is I

1 found an article. Look at what's at the top of that article,
2 it is a banner ad advertising the existence of the auto
3 dealers' settlement.

4 So I think the notice is probably okay and if there
5 is an issue about notice then the Court can certainly provide
6 a supplemental notice period. We don't think it is necessary
7 but if the Court rules in our favor it is a supplemental
8 notice, it is a very easy process, there are commercially
9 available lists, and it can be sent out and we can meet and
10 confer with the automobile dealer counsel and get it out
11 likely before the next time we see each other again after the
12 holidays.

13 THE COURT: Again I want to ask why do you think
14 the auto dealers have not objected to Rush coming on those
15 parts?

16 MR. IWREY: I can't answer that. There is likely
17 something behind the scenes, and it is not necessarily their
18 job to object but I can tell you that we would have objected
19 because of our closed and finalized settlement had we been
20 given the opportunity.

21 And the only other comment I would make, Your
22 Honor, in terms of the meeting of the minds there has been a
23 meeting of the minds, it was expressed in the plain wording
24 of the documents, and that's why the Michigan law is quite
25 clear that you can't come in after the fact with parole

1 evidence that said we really didn't mean that. We have
2 contemporaneous -- if you want to look at it there is
3 contemporaneous evidence of exactly what they meant and it is
4 in the March 31st letter, it is in the notice, and it is in
5 the statements that are made in the complaint. Thank you,
6 Your Honor, and happy holidays everyone.

7 THE COURT: Thank you, thank you both, and all of
8 you, and happy holidays to you. The Court will issue an
9 opinion. I guess the bottom line is this whole motion was a
10 surprise after the settlement but the Court will look at it
11 and issue an opinion.

12 MR. IWREY: As was the Rush complaint.

13 THE COURT: As was, yes.

14 MR. IWREY: Thank you.

15 THE COURT: Okay. Thank you very much.

16 THE LAW CLERK: All rise. Court is adjourned.

17 (Proceedings concluded at 3:07 p.m.)

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CERTIFICATION

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I, Robert L. Smith, Official Court Reporter of
the United States District Court, Eastern District of
Michigan, appointed pursuant to the provisions of Title 28,
United States Code, Section 753, do hereby certify that the
foregoing pages comprise a full, true and correct transcript
taken in the matter of In re Automotive Parts Antitrust
Litigation, Case No. 12-02311, on Monday, December 14, 2015.

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s/Robert L. Smith

Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

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Date: 12/17/2015

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Detroit, Michigan

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